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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 926

LEONARD S. GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Leonard S. Gordon, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case February 18, 1953 (R. 102).

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1), Section 240 of the Judicial Code, and Rule 37 (b) (2) Federal Rules of Criminal Procedure.

The Court of Appeals for the Ninth Circuit affirmed a judgment of conviction on February 18, 1953 (R. 102). Petitioner filed for rehearing, which was denied on March 18, 1953 (R. 103). This petition was filed within thirty days in accordance with the rules. Issuance of the mandate has been stayed by the Court of Appeals for the Ninth Circuit.

Opinion Below.

The District Court wrote no opinion. The opinion of the Court of Appeals (Mathews, Healy and Bone, Circuit Judges) has not yet been reported, and is contained in the record at pages 97-101.

The substantive portion of the opinion in this case, deciding the numerous issues presented in petitioner's opening brief before the Court of Appeals is contained in the words "The evidence is sufficient to sustain the verdict and judgment as to each count of the indictment" (R. 100, lines 5-7), and "* * * we have considered all paragraphs of the specification, have examined the entire record and have found no reversible error. Judgment affirmed." (R. 101, lines 23-25).

The balance of the opinion is devoted to a recital of the indictment and a summary of the mislabelled specifications of error (which were followed in the appellant's opening brief by 89 pages of discussion, full record references, etc., and an Appendix of 159 pages setting forth *totidem verbis* the rejected instructions, and evidence, rulings, grounds of objections, etc., referred to in the brief).

From those substantive portions of the opinion, it is impossible to determine the Circuit Court's view of the law applicable to this case.

Statute Involved.

Petitioner was prosecuted, convicted and sentenced under Section 145 (b) of the Internal Revenue Code, Title 26, U. S. Code.

Statement of the Matters Involved.

The judgment herein of the Court of Appeals for Ninth Circuit affirmed a judgment of conviction of petitioner for wilfully attempting to defeat and evade the income tax for himself and his wife for the years 1945 and 1946, in violation of section 145 (b) of Title 26, U. S. Code.

The indictment included four counts (R. 2-5). Counts 1 and 3 charging that petitioner wilfully attempted to defeat and evade the payment of his personal income tax by understating his income for 1945 and for 1946, respectively; counts 2 and 4 charging petitioner with a similar offense as to his wife's income tax for 1945 and 1946, respectively.

Petitioner was tried by a jury and convicted on all four counts. The evidence was in the main circumstantial.

The evidence was circumstantial, and on its face as consistent with innocence as with guilt. Aside from the question as the sufficiency of the evidence, there occurred during the trial various incidents which resulted in a denial of due process.

In obtaining the conviction the prosecution had to establish that a substantial amount of income was in fact omitted from the income tax returns. This was not and could not be established, for the prosecution relied upon the testimony of Internal Revenue Agents, in this connection, who admittedly did not audit the income tax returns involved in this case, but concluded that any sums they could not trace to the general ledgers, were necessarily not on the returns. They merely examined some records, including the general ledger, but did not audit the records or the ledgers. Due to the failure of accountants, bookkeepers and others employed by petitioner to handle his books and returns, to properly perform their duties, the books, through no fault of petitioner, were not kept in a normal manner, and fail to disclose the source of all the income recorded upon them. The agents, by use of so-called proper or correct accounting theories, concluded that the sack and cull bean income involved in this case was not on the books because it did not appear identifiably on those portions of the vast number of books and records where normally they should have

appeared. The general ledgers were shown, by uncontradicted testimony, to include "forcing entries," made by petitioner's bookkeepers and others, unbeknown to petitioner, to bring the books into balance, in sums many times in excess of those purportedly omitted from the unaudited income tax returns, and included "miscellaneous" sales and income which could readily have included the allegedly unreported sums.

The so-called expert testimony of these agents and "summaries" prepared by them and received in evidence, were based only in part upon evidence in the record, and in part upon matters outside of the record.

The prosecution also introduced in evidence certain "amended returns" as admissions against interest; these "amended returns" had been furnished to and obtained by the agents for the purpose of compromising the tax liability of petitioner. The evidence as to this aspect of the case is uncontradicted, and emanates from a highly respected member of the California Bar, and a former Internal Revenue Agent.

The trial court refused to give to the jury numerous instructions proferred by petitioner stating law favorable to his defense and related thereto, thereby depriving him and the jury of a full and correct statement of the law.

Petitioner's conviction on Count 1 as well as Count 2 and upon Count 3 as well as Count 4, constituted double jeopardy.

Questions Presented.

Did the Court of Appeals err in:

1. Holding that the evidence was sufficient to sustain the conviction of petitioner?

2. Holding, by its general statement that there is no reversible error, that no reversible error was committed by the receipt in evidence of "summaries" of facts in the case

The conviction was thus obviously largely brought about by the presence in this case of these evidentiary items which had no place in the record.

Argument

1. *The evidence was not sufficient to satisfy the minimum requirements in a circumstantial evidence case.*

The evidence here, consisting of more than 1700 pages of testimony and many exhibits, was as consistent with innocence as with guilt. Petitioner was not shown personally to have had anything to do with recordmaking or bookkeeping as to any of the literally millions of sales made by his many employees, particularly with regard to sales of sacks and culls. Each of the employees who actually handled the sales of these items and recordmaking incident thereto, absolved petitioner of any interference with or intrusion into their procedures or activities, and the employees directly concerned with these processes admitted that their instructions came from their predecessors, and not petitioner, and that they followed precisely the same procedures in prior years, when income from sales of sacks and culls is demonstrably included in the income reported on the income tax returns for those years, as was followed in the years 1945 and 1946 (R. 163, 198, 232, 267-273, 278, 287, 357, 409, 1258-1262, 1335, 1545, 1749. See also 1074, 1258; Pet.'s Exbs. DG, X and Y).

As pointed out in our petition herein, in obtaining the conviction, based upon circumstantial evidence, the prosecution relied in great part upon the testimony of internal revenue agents, who admittedly did not audit the income tax returns involved in this case, and did not audit the general ledgers upon which the returns were presumably based, but relied upon an accounting theory to reach the conclusion that the sack and cull bean income was omitted from the returns because the cash receipts did not appear on these

books where they "normally" would (R. 443-447, 457, 506-525, 548, 570-596). The general ledgers were shown, by uncontradicted testimony, to include "forcing entries" by petitioner's bookkeepers and others, unbeknown to petitioner, to bring them into balance, and "miscellaneous" sales and receipts in sums many times in excess of those purportedly omitted from the unaudited income tax returns (e.g. R. 640-658, 669-670, 696-706, 793-811, 1345-1448).

The agents whose "expert" testimony constitutes the sole evidentiary basis for a conclusion that any income was in fact omitted from the returns, thus merely assumed that the sack and cull income was omitted from the returns because they could not trace the *receipt of the cash payments* for such sales onto the general ledger. But the returns admittedly reported all income on the accrual basis (R. 575, 637) and even the agents admitted that recordation of cash received was immaterial (R. 575-8) and, aside from the agents' theoretical accounting approach (see, e.g. R. 443, 457-458, 461-462, 505-509, 515-518, 568-570, 579-612) there is no direct evidence that any part of petitioner's or his wife's income was in fact omitted from their income tax returns.

Plainly the mere fact that petitioner is shown to have received and spent the income from sacks and culls is not sufficient to prove beyond a reasonable doubt that his income tax return understates his income in any respect. And the application of theoretical accounting concepts cannot take the place of actual proof of omission of income from the returns, particularly where it is shown that petitioner's accountants and bookkeepers were incompetent and used forcing entries to balance the books which contained numerous "miscellaneous" sales and income accounts which could readily have included the sums involved in this case. The agents' theoretical approach must necessarily fall, when it is demonstrated that the keystone to their approach—prop-

erly balanced books—is a sham because of fictitious forcing entries used to bring about the balance. A conviction in this type of case should not be sustained upon such a theoretical approach, where the agents testifying as to the omissions admit that they merely "spot-checked certain items" (R. 508-509), and did not examine all the records upon which the income in question could normally have been included (R. e.g., 446-448, 457, 505-509).

In a recent somewhat parallel case, *Michael Caserta v. United States*, 199 F. 2d 905, the third Circuit reversed an income tax conviction because the agents assumed but did not properly investigate or separate the facts as to income. The holding enunciated in that case appears to be in conflict with the decision in this case.

In the light of the decisions in the *Spies*[a], *Loffman*[b], *Lurding*[c], *Tinkoff*[d], *Hargrove*[e], *Fenwick*[f], and other cases, the Court of Appeals should have reversed the instant conviction.

2. *The "summaries" are based in part on evidence outside the record and should not have been received in evidence.*

Purported "summaries" of certain technical data as to petitioner's finances affecting the correctness of the returns were introduced in evidence, by the prosecution, and extensive testimony was given as to these summaries (R. 464-465, 502-504, 530-547, 557-558; Govt. Exhs. 29, 30). These were based in part on matters outside the record of this case, including "work-papers" prepared by the agent, not in evidence, and from other sources outside the record in this case (R. 531, 547-548, 560-568, 623-624). All this was done contrary to established law that summaries must be based only on evidence in the record. See e.g., *United States*

[a]317 U.S. 492.
[b]152 F 2d. 393.
[c]179 F 2d. 419, 422.
[d]86 F 2d. 868, 880.
[e]67 F 2d. 820.
[f]177 F 2d. 488, 492.

v. Johnson, 319 U. S. 503; *Carlson v. United States,* 187 F. 2d 366; *United States v. Loffman,* 152 F. 2d 393; *United States v. Venuto,* 182 F. 2d 519.

Without these "summaries" the jury could hardly have understood what was the prosecution's basis for asserting that the returns understated the correct income. The receipt of such summaries in evidence plainly constituted grave prejudice to petitioner which requires reversal of his conviction.

3. *The amended returns for 1945 and 1946 were erroneously admitted in evidence.*

The prosecution introduced in evidence (R. 471-501), the amended income tax returns, as well as the originals, of petitioner and his wife, Frances Gordon, for the years 1945 and 1946 (Exs. 1, 2, 3, 4, 6, 8, 10, 12). This case did not involve the amended returns as such: it was based upon the original returns for 1945 and 1946.

The trial court admitted the amended returns in evidence (R. 502-503) and rejected petitioner's request that testimony on *voir dire* be taken to show the circumstances surrounding the preparation and filing of the amended returns (R. 500), leaving the issue as to admissibility to the jury.

These returns were admitted into evidence upon the theory that they constituted admissions by petitioner (R. 499).

The testimony of petitioner's then attorney, his tax adviser, and petitioner himself, as to the circumstances under which these amended returns were filed was not contradicted (see R. 485-487, 824-828, 976-993, 997-999, 1551-1561, 1659-1663).

For some time preceding the return of the indictment against petitioner, his tax adviser and legal representative were endeavoring to bring the civil controversy with the Treasury Department relative to the petitioner's income

and testimony relative thereto, which "summaries" were based in part upon alleged facts outside of the record in this case?

3. Holding, similarly, that no reversible error was committed by the receipt in evidence of "amended returns," originally submitted as offers in compromise, as admissions against interest?

4. Holding, similarly, that no reversible error was committed by the rejection by the trial court of proferred instructions as to the law?

5. Holding, similarly, that petitioner was not placed in double jeopardy by his conviction upon both counts 1 and 2, and both counts 3 and 4?

Reasons for Allowance of the Writ.

1. The decision herein sustaining the conviction appears to be at variance and in conflict with the various decisions of the Circuits cited in our brief in support of this petition relating to the proof necessary to establish in a criminal case the fact of omission of income from income tax returns, and the decisions holding that in a case involving conviction upon circumstantial evidence, the trial court may not leave to a jury the determination of guilt where the evidence on its face is as consistent with innocence as with guilt. That is clearly the case here.

2. The record contains numerous instances of denial of due process by the admission in evidence of matters which have no probative value and do not constitute legally admissible evidence.

3. A decision of a Court of Appeals in a criminal case should set forth in some detail the legal grounds upon which the appellant's contentions are overruled, so that this Court can determine the legal standards upon which the Court of Appeals acted, and determine whether those legal standards are in accord with the decisions of this Court and are in

harmony with the approved decisions of other Circuits.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Court to the Court of Appeals for the Ninth Circuit commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of proceedings of that court herein, being the case numbered and entitled on its docket as *"Leonard Gordon, appellant, vs. United States of America, appellee.,"* No. 13197, and that the judgment of that court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated: April 14, 1953.

LEONARD S. GORDON,
Petitioner

BY WILLIAM STRONG,
Attorney for Petitioner

BRIEF IN SUPPORT OF PETITION.

Statute Involved.

The Statute under which petitioner was indicted, convicted and sentenced, Section 145 (b) of Title 26, U. S. Code, provides in its pertinent part:

> "* * * any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, * * * be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, * * *."

Statement of Facts.

The Indictment

The indictment contains four counts, each charging a separate violation under the above quoted statute: Count 1 charges that petitioner wilfully attempted to defeat and evade the payment of *his* income tax for 1945 by understating his income; Count 2—to the same effect, but that petitioner violated the law by understating his *wife's income* on her return for 1945; Count 3—same as in Count 1, but as to the year 1946; Count 4—same as Count 3, as to appellant's wife's income for 1946 (R. 2-5).

The Evidence

Petitioner in 1945 and 1946 was the sole owner of a huge concern selling beans and other ferinacious products, employing hundreds of persons, including numerous bookkeeping and accounting employees. In 1945 the gross income reported by petitioner was in excess of $4,000,000 and in 1946 in excess of $5,000,000. Since 1932, petitioner had always used as his "take-home pay" the income from the sale of empty sacks, broken beans and other culls (R. e.g., 1457, 1488-1490, 1514-1517, 1543-1545).

Petitioner did not handle personally any of the vast number of invoices, records and books required for these opera-

tions. Due to apparent mishandling of the bookkeeping system by the bookkeepers and accountants, the books for the years in question here are in a complete state of confusion, having been brought into balance by forcing entries, and containing many "miscellaneous" sales and income accounts, composed of unidentifiable items totalling literally hundreds of thousands of dollars in excess of the allegedly unreported sums.

The Internal Revenue agents in the case did not audit the income tax returns on which the conviction in this case is based; they simply examined some of the *cash receipts* records, on which they found no entries as to the sack and cull income (R. see *infra*). Although the books were kept on the *accrual* basis (R. 575-578, 637), the agents concluded that this income was omitted in the income tax returns because it was not recorded in the cash receipts journals, whose totals were supposedly reflected in the overall general ledgers. The latter, however, had been forced into balance by petitioner's employees and accountants, and were incapable of analyses as to source of funds.

Thus without auditing the income tax returns themselves to determine whether they in fact did or did not report the full income subject to tax, the Internal Revenue agents assumed that the returns did not include that income (R. see *infra*).

To support its case, the prosecution in part introduced in evidence "amended returns," signed and filed by petitioner under circumstances clearly negating the effectiveness of these returns as admissions against interest of the purported facts contained in them (R. see *infra*). In addition, the prosecution was permitted to introduce in evidence so-called "summaries" of the evidence, which were in fact based in important respects upon evidence outside of the record (R. *infra*).

to an end.

The figures of additional income contained in the amended returns were not the product of petitioner or his advisers and could not be checked by them because of the chaotic state of the books and records; they were produced by the internal revenue agents in this case, and were merely accepted by petitioner as a means of disposing of the entire case without any intention on his part of admitting the existence of any unreported income or of any unpaid taxes. Due to the chaotic state of the records brought about by petitioner's employees, through no fault of petitioner, the agents' claims could not be negatived by proof as required in civil tax cases. As a result, it was decided to pay the extra tax. But petitioner has at no time conceded that there were any unpaid taxes for 1945 or 1946.

These returns were filed unwillingly by petitioner, with a letter, upon the advice of advisers that such amended returns were necessary to close the entire tax matters, and upon their belief, based upon their past experience and dealings with internal revenue agents, that this was the fact.

In causing petitioner to file the amended returns, his tax advisers acted upon the well-known policy of the Bureau of Internal Revenue, stated by the Assistant Head of the Penal Division, Office of the Chief Counsel, Bureau of Internal Revenue:

> "While the case remains open on the prosecution question, established Bureau policy precludes any attempt to reach a settlement of the civil liability."[8]

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[8]Richard C. Schwartz, Assistant Head of the Penal Division, Office of Chief Counsel, Bureau of Internal Revenue, TAX FRAUD CASES, Practice and Procedure, American Bar Association, Section on Taxation, Matthew Bender & Co. Symposium held in Washington, D. C., September 19, 1950 (p. 20, lines 20-23).

Petitioner, in reliance upon this advice, and for the purpose of a civil settlement only, signed the amended returns.

In a situation such as this the amended returns clearly do not constitute admissions, and should not have been received in evidence. Moreover, the determination as to their admissibility was for the Court, and should not have been left to the jury.[h]

The statutory law of California states that ". . . an offer of compromise is not an admission that anything is due." (Code Civ. Proc., Sec. 2078).

As stated in *Reinderl v. United States*, 150 F. 2d 493, 497:

> "It is impossible, however, by approval to stigmatize the many thousands of taxpayers who file amended returns as persons admitting, by such filing, that their original returns were false and untrue. . . . There should be no discouragement in the filing of an amended return and no hazard in doing so."

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[h]The jury instruction in this connection sought by appellant was not given by the Court (App. 4). The instructions given to the jury read:

The Court: "You may consider whether, under all of the circumstances in this case, these amended returns constitute an admission that the original returns were incorrect, as is contended by the Government or whether, as contended by the defendant, their filing is evidence of good faith on his part in correcting errors in the original returns when discovered by him." (1313)

The Court: "An admission is a statement or acknowledgment of the defendant, made on occasion other than this trial, tending to prove his guilt of alleged crime for which he is on trial.

"An admission is something less than a confession in that it does not concede so much pointing toward defendant's guilt, and does not alone, even if true, support a deduction of guilt. It may consist of any statement or other conduct by a defendant whereby he expressly or impliedly acknowledged a fact that contributes in some degree to the proof of his guilt of an alleged crime for which he is on trial, and which statement was made or conduct occurred outside of that trial." (1311.)

"An admission . . . must be the acknowledgment of a fact and not a mere opinion." (*Coca-Cola v. Munn,* 99 F. 2d 190.)

"The law favors attempts to compromise and settle litigation, and, for that reason, will not permit one party to a settlement attempt to introduce against the other, over objection, statements made to induce a compromise or in the course of negotiations to that end." (Citing *West v. Smith,* 101 U. S. 263; *Lowenstein v. Federal Rubber Co.,* 85 F. 2d 129; *Arnold v. Owens,* 78 F. 2d 495; *Hawthorne v. Eckerson,* 77 F. 2d 844." *Cyclopedia of Federal Procedure* (2nd Ed.) Volume 7, Section 3186, page 258.

"It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction. * * * No party to a justifiable controversy should be discouraged from amicably adjusting his claim by the fear that he might subsequently be confronted with the contention that his concession there was an admission of liability. The rule protecting compromises is too salutary to be whittled away." *Brown v. Pacific Electric Ry. Co.,* 79 Cal. App. 2d 613, 180 P. 2d 424 (1947).

See also: *In re Graves,* 182 Fed. 443 (1910); *Shipley v. Pittsburgh & Ler Co.,* 83 Fed. Supp. 722 (1949); *Bratt v. Western Air Lines,* 169 F. 2d 214 (1948, 10th Cir.); *Martin v. Burgess,* 28 F. 2d 321, 323.

4. ***The trial court failed to give to the jury full and correct instructions as to the law and, specifically refused and failed to give to the jury certain of the instructions offered by petitioner.***

The trial court, "In a criminal case * * * must instruct on all essential questions of law involved whether or not it is

requested to do so." (*Samuels v. United States,* 169 F. 2d 787, 792 (C.C.A. 9); *Morris v. United States,* 156 F. 2d 525 (C.C.A. 9))

There was much evidence in the record supporting petitioner's factual contentions, as to which he sought, but the trial court nevertheless did not give certain instructions. Petitioner was entitled to have the jury instructed along the lines requested by him, even if not in the precise language sought.

Thus, the trial court refused to give petitioner's proposed instructions relative to the defense of reliance upon accountants and others and upon the activities of others, as to his non-culpability where there was present negligence of others, and reliance upon an established course of conduct (R. 30, 50-53, 54); as to the meaning of the term "substantial" (R. 32-33); as to the necessity for the prosecution to establish the fact of omission of income from the returns and taxes due (R. 33, 42-43, 47-48); as to evidence of wilfulness, good faith, etc. (R. 37, 46-50, 54-55); as to the legal assumption that witnesses subpoenaed and not called to the stand would have testified adversely to the subpoenaeing party (R. 34).

Instructions offered by petitioner were also refused by the trial court relative to the keeping of books where taxes are paid on accrual basis (R. 35); what constitutes a "record," etc. (R. 35, 36); concerning amended returns as admissions (R. 35); circumstantial evidence (R. 45-46).

As a result, the jury was not correctly and fully instructed in the law as it applied to petitioner's version of the facts and to petitioner's defense.[1]

[1]While the Court of Appeals states in its opinion that these instructions were not before it, the fact is that they were included, *totidem verbis,* in the Appendix to the brief before that court, in compliance with the rule of that all quoted matters of more than two pages in length must be included in a printed appendix to the brief. (R. 32-56.)

5. *The trial court erred in overruling petitioner's motion to strike certain counts in the indictment on grounds of double jeopardy.*

Petitioner moved to dismiss Counts 2 and 4 on grounds of double jeopardy (R. 4).

These Counts involved Mrs. Gordon's community property share of petitioner's income, and reflected merely a distribution of the figures on petitioner's own returns. The returns were merely the instrumentality of the crime charged; the crime alleged was one and the same for both counts for each year, namely, a wilful attempt to defeat and evade the tax for that year upon the same income. The same evidence was introduced for both counts for each year, except that there were separate returns for each year for petitioner and his wife.

As counsel for the prosecution admitted in argument on this point before the trial court (R. 13) that "this arises out of the same transaction. This is one offense for the year of 1945 and one offense for the year 1946, * * * there is actually one offense, but the one offense is divided into two counts * * *" (R. 13). "* * * it is one offense but in two counts * * *" (R. 14). "* * * it is all a part of the same offense and the fact that the facts may be the same in the two counts, the offense is still one offense for the same year separated into separate counts." (R. 15.)

That was precisely petitioner's complaint: one offense was divided by the prosecution into two counts. (See, e.g., *Blockburger v. United States,* 284 U. S. 299.) *Constitution of United States,* Amend. V; *Romley v. Welch,* 114 F. 2d 499; *Clawson v. Rives,* 104 F. 2d 240; *Levin v. United States,* 5 F. 2d 598; *Brewster v. Swope,* 180 F. 2d 984 (C.C.A. 9); *United States v. Bridges,* 86 F. Sup. 922; *Ross v. United States,* 103 F. 2d 600 (C.C.A. 9); *King v. United States,* 31 F. 2d 17 (C.C.A. 9), affd., 280 U. S. 521.

Counts 2 and 4 should have been dismissed.

Conclusion.

It is respectfully submitted that upon the grounds set forth herein, the petition for a writ of certiorari should be granted by this Court.

Respectfully submitted,

WILLIAM STRONG,

Attorney for Petitioner